



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FOF - 174118

PRELIMINARY RECITALS

On May 5, 2016, the below named Petitioner filed a hearing request under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to disqualify the Respondent from the FoodShare program for a period of one year. The hearing was held on June 17, 2016, in Milwaukee, Wisconsin.

The issue for determination is whether the Respondent committed an Intentional Program Violation.

NOTE: Judicial notice is being taken of the plea agreement and conviction in case [REDACTED] [REDACTED], from the Federal District Court.

The record was held open until the end of the day to give the agency an opportunity to submit an EBT Card Issuance/Return History printout. It has been marked as Exhibit 16 and entered into the record.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED], Income Maintenance Specialist Advanced
1220 W. Vliet St., Room 106
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:
Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who received Foodshare benefits between October 2011 and September 2012. He generally received \$200 in benefits on the 9th of the month. (Exhibit 5)
2. In March 2011 and September 2011, the agency sent the Respondent an Eligibility and Benefits booklet that advised him of the penalties for buying or trading his benefits, including disqualification from the program. (Exhibits 9 and 10)
3. In August 2010, the owner of [REDACTED] became an authorized SNAP vendor, but was no longer a subcontractor distributing seafood and meat. Instead, he was purchasing FoodShare benefits for cash, paying the benefit recipients only a percentage of the face value of the card. The recipients did not receive any food products. This continued until January 2013. (Exhibit 12)
4. On October 11, 2011, an EBT card ending in [REDACTED] and attributed to the Respondent was used to make two “purchases” of \$80.00 and \$100 from [REDACTED]. (Exhibit 14)
5. A client summary indicates that the card ending in [REDACTED] was issued and immediately replaced on August 20, 2012, although an EBT Card Issuance/Return History print out indicates the card was issued on December 24, 2010. (Exhibits 13 and 16)
6. On May 16, 2016, the Department of Health Services, Office of the Inspector General sent the Respondent an Administrative Disqualification Hearing notice, indicating that it believed he trafficked his FoodShare benefits with [REDACTED] on October 11, 2011.¹ (Exhibit 3)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a

¹ It should be noted that the Administrative Disqualification Hearing Notice was defective, because it listed an incorrect case number. However, as will be discussed later in this decision, the agency's IPV determination is being reversed on other grounds.

showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on June 17, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to him at the [REDACTED] post office box, which is an address used by homeless individuals. [REDACTED] indicated that as of the hearing date, this was the Respondent's last known address. [REDACTED] further indicated that the agency did not receive any returned mail.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear. As such, it is found that the Respondent did not have good cause for his non-appearance.

What is an IPV?

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the Agency's Burden of Proof?

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the Respondent committed the IPV.

The Merits of the Agency's Case

In the case at hand, Milwaukee Enrollment Services has not established, by clear and convincing evidence that the Respondent was selling his FoodShare benefits.

Although the Merchant Summary in Exhibit 14 shows that an EBT card attributed to the Respondent was used to conduct transactions with [REDACTED] in October 2011, the Client Summary indicates the card used in the October 2011 transaction wasn't issued until August 2012.

The agency provided an EBT Card Issuance/Return History printout showing that the card in question was issued on December 24, 2010 and might have been replaced with another card in August 2012. However, the agency was not able to explain why the EBT Card Issuance/Return History printout was any more reliable than the dubious Client Summary printout. Without more information, it is unclear where the fault in the documents lies. Consequently, the IPV alleged here, cannot be upheld.

I note that there have been other cases in which the Client Summary has inexplicably indicated that the cards allegedly used in the suspicious transactions was issued a month or so after the transactions. See Cases FOF-173363, FOF-172260, FOF-173139, and FOP-174485.

CONCLUSIONS OF LAW

The agency has not met its burden to prove the Respondent committed an intentional program violation (IPV) by trafficking his benefits with [REDACTED] on October 11, 2011.

THEREFORE, it is

ORDERED

That the IPV for claim number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

If you disagree with this decision, you may appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

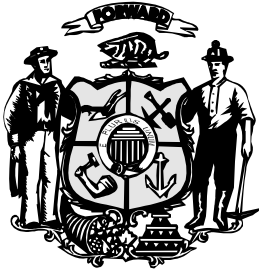
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that

Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of
Milwaukee, Wisconsin, this 15th day of July,
2016

\s _____
Mayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on July 15, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@dhs.wisconsin.gov